Stephen Bong v FCB (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3–25–10–98
NIK HASHIM J
30 APRIL 1999

Labour Law *— Employment — Redundancy — Whether means job or work no longer exists — Executive director applicant dismissed because of reduced work and business in company — Whether amounts to redundancy*

Labour Law *— Employment — Retrenchment — Executive director applicant retrenched whilst subordinate account director retained — Whether LIFO (last in first out) principle breached*

The applicant was the executive director of the respondent company. By a letter dated 9 October 1995, the applicant was retrenched by the company with three months' salary in lieu of notice. The dismissal was referred to the Industrial Court which held that the termination of the applicant's service with the respondent company was with just cause and excuse on the ground of redundancy. The applicant then applied for an order of certiorari to quash the award of the Industrial Court.

The applicant contended that the award is unreasonable and perverse in view of the evidence before the Industrial Court. It was argued that the applicant was not redundant as there was work to be done and this work was taken over by his subordinate, one Kwan Fatt. It was also argued that the applicant, being senior to Kwan Fatt, was asked to go in breach of the LIFO (last in first out) principle.

Held, dismissing the application with costs:

The award revealed that the learned chairman had investigated the facts as to whether the applicant's job function continued to exist after his termination. After evaluation of all the evidence as a whole, the Industrial Court had come to a finding of fact that Kwan Fatt did not take over the work of the applicant after the applicant's retrenchment. It is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind. The Industrial Court was right when it held that the applicant was redundant as there was reduced work and reduced business within the company which made the applicant's position as an executive director in charge of one of the groups redundant. (see pp 414I–415A, 416B)

There was no breach of the LIFO principle. Kwan Fatt, being the account director was not in the same category as the applicant who was the executive director in so far as the job function is concerned. The termination of the service of the applicant was therefore proper (see p 416B–C).

[Bahasa Malaysia summary

Pemohon merupakan pengarah eksekutif syarikat responden. Melalui surat bertarikh 9 Oktober 1995, pemohon telah diberhentikan kerja oleh syarikat tersebut dengan tiga bulan gaji sebagai ganti notis. Pemecatan tersebut dirujuk kepada Mahkamah Perusahaan yang memutuskan bahawa penamatan perkhidmatan pemohon dengan syarikat responden adalah dengan sebab dan alasan yang adil atas alasan kekurangan kerja. Pemohon kemudian memohon untuk suatu perintah certiorari untuk membatalkan award Mahkamah Perusahaan.

Pemohon menegaskan bahawa award tersebut adalah tidak munasabah dan salah memandangkan keterangan di hadapan Mahkamah Perusahaan. Adalah dihujahkan bahawa pemohon bukan pekerja yang berlebihan memandangkan terdapat kerja untuk dibuat dan kerja ini adalah diambil alih oleh pekerja bawahan beliau, Kwan Fatt. Adalah juga dihujahkan bahawa pemohon, yang lebih kanan daripada Kwan Fatt, telah diminta untuk pergi dengan melanggar prinsip LIFO (terakhir masuk pertama keluar).

Diputuskan, menolak permohonan dengan kos:

Award mendedahkan bahawa pengerusi yang arif telah menyiasat fakta-fakta sama ada fungsi pekerjaan pemohon terus wujud setelah penamatan beliau. Setelah menilai kesemua keterangan sebagai seluruhnya, Mahkamah Perusahaan telah mencapai suatu penemuan fakta bahawa Kwan Fatt tidak mengambil alih kerja pemohon setelah penamatan pemohon. Adalah bukan undang-undang bahawa kekurangan kerja bermaksud pekerjaan atau kerja tidak lagi wujud. Kekurangan kerja timbul di mana perniagaan tidak memerlukan banyak pekerja-pekerja tidak mengira jenisnya. Mahkamah Perusahaan adalah betul apabila ia memutuskan bahawa pemohon adalah pekerja yang berlebihan memandangkan terdapatnya kekurangan kerja dan perniagaan di dalam syarikat yang menjadikan kedudukan pemohon sebagai pengarah eksekutif yang bertanggung-jawab terhadap salah satu kumpulan adalah pekerja yang berlebihan (lihat ms 414I–415A, 416B).

Tiada pelanggaran prinsip LIFO. Kwan Fatt, yang merupakan pengarah akaun bukan di dalam kategori yang sama seperti pemohon yang merupakan pengarah eksekutif sejauh mana fungsi pekerjaan adalah berkenaan. Penamatan perkhidmatan pemohon adalah maka demikian adalah wajar (lihat ms 416B–C).]

Notes

For a case on redundancy, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) para 823.

Cases referred to

Pipraich Sugar Mills v Pipraich Sugar Mills Mazdoor Union AIR 1957 SC 95 (refd)

William Jacks & Co (M) Bhd v S Balasingam [1997] 3 CLJ 235 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(3)

Vincent Chandran (*N Devakaran* with him) (*Badaruzaman Chandran & Co*) for the applicant.

N Sivabalah (*Shearn Delamore & Co*) for the repondent.

Cur Adv Vult

Nik Hashim J:

Application

This is an application for an order of certiorari by Stephen Bong, the applicant, to quash the Industrial Court's Award No 596 of 1997 dated 16 December 1997 which held that the termination of the applicant's service with the respondent company was with just cause and excuse on the ground of redundancy.

Background of case

The applicant was at the material time employed as executive director of FCB (M) Sdn Bhd, the respondent company. By a letter dated 9 October 1995, the applicant was retrenched by the company with three months' salary in lieu of notice. The letter reads:

> Dear Stephen,
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> *Retrenchment*
>
> Our discussion pertaining to the above refers.
>
> We wish to advise that from the review of the operation of the company and its current and future manpower requirements, we have established that there is a need to downsize the company's operation. This is attributable to the fact that the company's business is soft and depressed and to aggravate the situation, we have lost some sizeable accounts. As a result of the review, the management regretfully wishes to inform you that your position within the company has become redundant.
>
> In accordance with your contract of employment, we now give you three (3) months' notice of termination of your services. To enable you to seek alternative employment, the management had decided to waive the notice period and shall pay you three (3) months' salary in lieu of the three (3) months' notice period. Your last day of service shall be 9 October 1995.
>
> In addition, you will be paid for all outstanding leave. ...
>
> Yours faithfully,
> (sgd)
> Russel Walter
> Managing Director

Pursuant to representations by the applicant, his dismissal was referred to the Industrial Court under s 20(3) of the Industrial Relations Act 1967 ('the Act'). In the Industrial Court, the applicant called two witnesses including himself while the respondent company called three witnesses. The Industrial Court upheld the retrenchment of the applicant and dismissed the applicant's claim.

The Industrial Court's Award

In his award, the learned chairman of the Industrial Court at p 334 of the record held:

> Consequently, it is the finding of this court based on equity and good conscience, that the company's retrenchment exercise affecting the claimant (applicant), was a bona fide exercise of its prerogative rights to downsize and reorganize its business caused by the 'soft and depressed market' to which 'the loss of some sizeable accounts of the company had aggravated the situation' causing the retrenchment of the twenty-six workers.
>
> There was no evidence that the claimant (applicant) was wrongfully dismissed without just cause or excuse. He was rightfully retrenched for just cause: redundancy.

Contentions of the applicant

Before me, Mr Vincent Chandran for the applicant, submitted only on one ground that the award is unreasonable and perverse in view of the evidence before the Industrial Court. He argued that the applicant was not redundant as there was work to be done in respect of new accounts, and counsel relied on Kwan Fatt's evidence to support his argument. Kwan Fatt (COW-2), who was the applicant's subordinate prior to the applicant's dismissal, said in his testimony at p 27 of encl 6:

> I was held responsible of those accounts after claimant (applicant) was in charge as supervisor for the group of accounts. After claimant (applicant) left I had to do the supervision of that group.

Counsel further argued that the applicant, being senior to Kwan Fatt, was asked to go and this was in breach of the LIFO (last in first out) principle.

Contention of the respondent company

Mr N Sivabalah for the company on the other hand, submitted that there is no basis for the application as there is more than ample evidence to support the Industrial Court's conclusion.

Court's findings

In my judgment, there is no merit in the application. The award is not unreasonable and perverse as claimed. The learned chairman of the Industrial Court had taken all the relevant factors into consideration when he arrived at his findings of fact which formed the basis of the award. The Industrial Court had made a firm finding of fact that there was a redundancy situation which was caused by the soft and depressed market

A resulting in the loss of sizeable accounts (clients) of the company. The applicant was not alone in the retrenchment exercise, there were 25 other employees who were asked to go. The Industrial Court had asked itself correct questions before concluding that the applicant was rightly retrenched on the ground of redundancy when it posed questions to itself at p 333 of the record:

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> On the over-view of the evidence as a whole, did the Company Act in an arbitrary or capricious manner in selecting the claimant (applicant) to go, along with twenty-six others? Were there mala fides or bad faith such that the retrenchment was in fact a dismissal in disguise for the purpose of victimizing the claimant (applicant)? Did the company in any way act in an unfair and
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> C unreasonable manner in identifying the claimant (applicant) as being redundant to effect his retrenchment?
>
> The court will rule that the answers to all the questions, are in the negative and there is no evidence to prove the contrary.

The facts before the Industrial Court showed that the applicant was surplus

D or redundant which justify retrenchment within the meaning of the test in *William Jacks & Co (M) Bhd v S Balasingam* [1997] 3 CLJ 235, where Gopal Sri Ram JCA at p 241 said:

> ...Retrenchment means the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action (per SK Das J in *Hariprasad v Divelkar* AIR 1957
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> E SC 121 at p 132).
>
> Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending on the question of fact and degree depending on a particular circumstances of the case. It is well settled that the employer is entitled to organize his business in the manner he considers best. So long as the managerial power is exercised bona fide, the
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> F decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound to investigate the facts and circumstances of the case to determine whether the exercise of power is in bona fide.

Retrenchment connotes in its ordinary acceptation that the business itself is

G being continued but that a portion of the staff or the labour force is discharged as surplusage (see *Pipraich Sugar Mills v Pipraich Sugar Mills Mazdoor Union* AIR 1957 SC 95).

The award at pp 329–332 revealed that the learned chairman had investigated the facts as to whether the applicant's job function continued to exist after his termination. It is true that Kwan Fatt (COW-2) did say in

H his testimony at p 27 as quoted above, but this isolated piece of evidence must be tested in the light of the rest of the evidence. In this respect, the learned chairman is right when he, after evaluation of all the evidence as a whole, came to a finding of fact that Kwan Fatt did not take over the work of the applicant after the applicant's retrenchment where at p 332 of the

I record he said:

> The court will rule that whatever intercourse there was, James Kwan (Kwan Fatt) did as he had always done on a day-to-day basis, and after the claimant (applicant)'s termination, on the residual matters that were left to be done

until completion. As COW-3 rightly stated 'Campbell Soup — still had leftovers'.

With respect, I agree with Mr N Sivabalah's submission that it is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind ('*Harvey on Industrial Disputes*'). In the case before me, it is the Company's case that there was reduced work and reduced business, which made the applicant's position as an executive director in charge of one group redundant. The Industrial Court is right when it held that the applicant was redundant.

Finally, with regard to the application of LIFO, I find that there was no breach of the principle. Kwat Fatt, being the Account Director, was not in the same category as the applicant who was the Executive Director, in so far as the job function is concerned. Thus, the termination of the service of the applicant was therefore proper.

The Industrial Court's decision revolved principally around findings of fact based on the credibility of witnesses whom the learned chairman had seen and heard. Since the Industrial Court has committed no error of law, there is no justification for this court to interfere with the Industrial Court's decision. Consequently, I ordered that the application for certiorari to be dismissed with costs.

Application dismissed.

Reported by Joel Ng